92-1673

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

IN THE MATTER OF:
CHRIS J. ROY
Debtor

CHRIS J. ROY
Petitioner

v.

CAMILLE F. GRAVEL, JR.
and
RICHARD V. BURNES
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Roy vs. Gravel
570 so. 2d 1175 (La. App. 3 Cir. 1990)

Before DOUCET, YELVERTON and KING, JJ.

YELVERTON, Judge.

The litigation from which this appeal arises is between the partners of a law firm, Gravel, Roy & Burnes, which operated in Alexandria, Louisiana, during the decade between 1970 and 1980. The appellants are Christopher J. Roy and Chris J. Roy, A Law Corporation. The defendants (and reconvenors) are Camille F. Gravel and Richard V. Burnes. After their original appellate brief was filed, reciting their original assignments of error, the Roy appellants (Roy) filed an exception of no cause of action in the appellate court, and a supplemental brief in support thereof.

The exception of no cause of action is addressed to the reconventional demands of Gravel and Burnes, which in the court below resulted in the judgment now on appeal by the Roy Appellants. For the reasons hereinafter explained, we affirm the judgment of the trial court and overrule the exception of no cause of action.

THE APPEAL

This suit was filed on June 4, 1982, and tried over a three day period six years later in July 1988. Roy sued seeking a declaratory judgment that certain written agreements between him and Gravel and Burnes were partnership agreements and were thus terminable at the will of any partner. Gravel and Burnes filed a reconventional demand seeking an accounting, an injunction, specific performance, and other relief.

After a trial, the district court ruled in favor of Gravel and Burnes and against Roy, finding that:

1. The Gravel, Roy and Burnes partnership (GRB) was dissolved as of January 19, 1980.

2. A written dissolution agreement entered into by these three parties in valid, binding and enforceable.

3. Roy and his law corporation must perform in accordance with the dissolution agreement.

4. Gravel is entitled to a judgment against Roy in the amount of $316,696.98, subject to certain credits.

5. Burnes is entitled to a judgment against Roy in the amount of $216,220.19, subject to certain credits.

The judgment further required Roy to

account for certain other GRB cases, and directing the manner in which future performance should occur under the dissolution agreement.

Roy subsequently filed a motion for a new trial, along with a motion to recuse the trial judge from hearing the motion for a new trial. Both these motions were denied.

On this appeal Roy contends that the so-called partnership dissolution agreement was actually an agreement establishing a new partnership, terminable at will, and that he terminated it on December 4, 1980, or at the latest, April 1, 1982. From this he contends that after December 4, 1980, or at the latest, April 1, 1982, he has been under no obligation to account to the order partners, and that they are under no obligation to account to him.

The trial judge gave excellent reasons for judgment, which we approve, and we shall adopt portions of those reasons or our own. We begin by adopting the trial judge's explanation of the history leading up to the litigation.

The history leading up to this litigation is as follows: Gravel, Roy and Burnes practiced law as a partnership between 1970 and 1980. The partnership operated according to the terms of oral agreements and understandings between the partners. On January 13, 1980, Roy gave notice to Gravel and Burnes of his intention to withdraw from the partnership. The written agreements now at issue were then drafted to provide the terms for the orderly dissolution of the partnership property and business. These agreements were signed in

March of 1980, and were agreed to be retroactive to the date chosen as the termination of the partnership, January 19, 1980. There were some slight amendments to the original agreement, signed in October and December, 1980. The physical property of the partnership was distributed and the client case work of the partnership as of January 19, 1980, was divided between the partners with special terms and provisions for the division of the fees and expenses that would be earned from the work on these cases.

Under the terms of the agreement Roy assumed, as his obligation to the partnership, the completion work on some 268 cases, appearing on Exhibit Roy #1. Gravel and Burnes assumed responsibility for completing the work on "all other matters of

the legal partnership". No listing was included showing specifically what case work was to be completed by Gravel and Burnes.

For a period of time, Roy performed in accordance with the agreements, and as the casework assumed by him was completed, the fees paid were duly accounted for under the terms of the agreement. In December 1980, Roy notified Gravel and Burnes that the dissolution agreements were unsatisfactory and that, as a partner, he was terminating the relationship. Roy still continued through 1981 to settle some casework assumed by him and account for the fees paid, pursuant to the terms of the agreement. In September 1981, Roy again wrote Gravel and Burnes and indicated he would no longer handle cases of the former partnership. Roy wrote to Gravel and Burnes again in April

1982 and reiterated his intention to work no further on casework of the former partnership. Following his April 1982 notification, Roy ceased to comply with the terms of the agreement and has taken no further action to conclude the cases provided for in the agreement or to deposit any fees paid under the terms of the agreement.

Shortly after this, on June 4, 1982, Roy commenced the present litigation by filing a petition seeking a declaratory judgment interpreting the dissolution agreement. As mentioned in the trial court's explanation above, there were actually four written dissolution agreements, but only the first is important to the issues involved in this case. Before returning to the trial court's

reasons for judgment, we will describe the dissolution agreement.

[1] The agreement is styled: PARTIAL AGREEMENT REGARDING DISSOLUTION OF GRAVEL, ROY & BURNES, so styled because it was limited, in their language, to an" "AGREEMENT WITH RESPECT TO (A) ACCOUNTS RECEIVABLE, (B) WORK RESPONSIBILITY FOR CLIENTS' CASES, AND (C) DIVISION OF FEES FROM CLIENTS' CASES. The parties were the three partners, the agreement referring to them by their first names.

Under the heading: PURPOSE OF AGREEMENT, the parties recited that the date of the termination of the law partnership was fixed as of the close of the business day of January 19, 1980, and that:

> Accordingly, the purpose of this agreement is to govern among the contracting parties with respect to the collection of the accounts receivable of the law partnership, the division of the work responsibility of existing clients' cases, and the division of the fees thereby generated among the partners, all with respect to cases, engagements, and services entered into by them or their associates prior to January 20, 1980.

The Dissolution Agreement went on to recognize that the three partners:

> [E]ach have a financial interest in all of the cases of the clients of Gravel, Roy & Burnes as of January 19, 1980, regardless of which attorney completes the legal work in connection with the handling of the case. This agreement similarly recognizes that Camille, Chris and Richard each has a responsibility for the completion of the legal work in connection with each of those cases.

The agreement then states:

> It is agreed that whichever attorney in the law firm of Gravel, Roy & Burnes was handling a case as of January 19, 1980, will continue to handle the case and perform the legal services in that case until its conclusion. All money received as fees from the cases, except for 30% of the fee if it is handled by an associates of the former law firm of Gravel, Roy & Burnes or any associate of its successor firm, Gravel, Burnes & Robertson, will be paid in a bank account and fund established by Camille, Chris and Richard. Settlements, however, and trust funds will be handled through a trust account in the same manner as was handled in the Gravel, Roy & Burnes Trust Account during the existence of the partnership.

Under the dissolution agreement Roy expressly undertook primary responsibility for completing work on 268 specific GRB clients' cases. Gravel and Burnes took primary responsibility for completing work

on the remainder of GRB clients' cases. The testimony at trial indicated that these later numbered in excess of one thousand.

We return at that point to the trial court's reasons for judgment:

> Roy alleges that the dissolution agreement was simply the establishment of an 'interim partnership' formed to carry out the dissolution of the partnership affairs and was not a binding contract or agreement, or that in the alternative the agreement established an 'inadvertent partnership' was not a binding contract or agreement. Roy also alleges that the 'interim partnership' or the 'inadvertent partnership' was there- fore subject to the Louisiana law on partnership and was terminable at will by any of the partners. Roy alleged that his notification on April 1, 1982, to Gravel and Burnes of his intention to terminate the 'interim' or 'inadvertent' partnership, did in fact dissolve the partnership and he is no longer bound by the terms of the dissolution agreements.
>
> After reviewing all the evidence and the law pertinent to this issue, this Court is of the opinion that termination of

the original partnership entity of Gravel. Roy and Burnes was begun by Roy upon his notification on January 13, 1980. The pertinent Louisiana partnership law regarding withdrawals from a partnership that was in effect at the time of the termination, was found in Stone vs. Stone, 292 So. 2d 686 (La. 1974), were the Court states:

> If a partnership has been constituted without a term, a partner may withdraw from the partnership without the consent of his partners.

The partnership code which became effective January 1, 1981, contains a codification of the Stone rule under LSA-C.C. Art. 2822. This rule fully establishes that Roy, as a partners in the partnership without a term, was entitled to and did in fact terminate the partnership by giving reasonable notice to the other partners. This Court concludes that the effective date of the termination is the close of the business day on January 19, 1980, as evidenced by and agreed to by the partners in their dissolution agreement of which Roy was a party.

This Court has concluded after reviewing the evidence and applicable law that the four dissolution agreements entered into by the former partners constitute a 'private settlement' of Gravel, Roy and Burnes business affairs and in no way do

the contract establish an 'interim' or 'inadvertent' partnership, terminable at will. . . .

Although the dissolution agreements do contain several of the essential elements that Louisiana law requires in finding that an 'inadvertent' partnership has been formed, there is one very essential element that is missing--intent to form a business relationship. In fact Roy, Gravel and Burnes were attempting to do exactly the opposite--intent to dissolve a business relationship. This 'dissolution agreement' contained several of the same terms that Gravel, Roy and Burnes had conducted the partnership business under, but all three parties could have disagreed to these and contracted to change these. The partners all consented to the terms and signed this 'private settlement' and their contractual obligations would have expired at the completion of all casework and division of assets existing of their former partnership.

Generally, an action is not maintainable between partners with respect to partnership transactions unless there has been an accounting or settlement of the partnership affairs, Jeffries v. Moore, 219 La. 692, 52 So. 2d 898 (1951). We agree with the Court in Douglas v. Thomas, 489 So. 2d 449 (La. App. 4th Cir. 1986) which held that one exception to this rule is that a:

> Private settlement and account of partnership affairs is binding on parties consenting thereto.
>
> and
>
> Partners may sue each other upon obligations arising from a private settlement agreement.

These agreements were made and signed after Roy's notice of termination in December 1980, and were signed in March 1981 and constitute a 'private settlement'. The dissolution agreements make no mention of any time or method of termination. LSA-C.C. Art. 1983 states:

> Contract have the effect of law for the parties and may be dissolved only through the consent of the parties or on ground provided by law.

There has been no consent of the parties involved here to dissolve the agreement and the evidence introduced has proven no legal rounds for the Court to dissolve the agreements. Thus the partners involved in litigiation here are entitled to maintain an action between each other with respect to the 'private settlement'.

We also agree with the Court in Quinn-L Corporation v. Elkins, 519 So. 2d 1164 (La. App. 1st Cir. 1987) where it stated:

> Legal [a]greements have effect of law upon the parties, and as they bind themselves, parties shall be held to a full performance on obligations flowing therefrom.

Thus, the dissolution agreements are not terminable at will by a former partner. It appears from the language in the agreement that the only way for the agreement to cease to be effective is when all case work t hat was the property of Gravel, Roy and Burnes at the close of business on January 19, 1980, has been completed and the fees divided according to the terms of the agreement. . . .

Therefore, this Court concludes that the dissolution agreements are valid, enforceable and not terminable at Roy's will. Roy, Gravel and Burnes are still bound by the terms of the four agreements and must comply with them. Roy is liable to Gravel and Burnes for their proportionate share of fees and expenses on the Gravel, Roy and Burnes cases on which Roy agreed to complete the case work as follows: (1) in their proportionate share of fees and expenses which Roy has already collected, upon the rendition of the judgment in this case; (2) in their proportionate share of fees due under any annuities and structured settlement as Roy receives

such payments; (3) in interest beginning to run on the date Roy received such fees and expenses and accruing at the legal rate of in effect on the date Roy received them; (4) in their proportionate share of fees and expenses (if any) for cases for which Roy has not yet accounted. Roy is entitled to a credit for any amounts he has paid thus far.

Gravel and Burnes are liable to Roy, in the same manner, for his proportionate share of fees and expenses on Gravel, Roy and Burnes cases, on which they agreed to complete the casework at the time of dissolution and must provide Roy with list of all these cases as of January 19, 1980. Gravel and Burnes are also entitled to receive a credit for any amounts they have paid thus far. Payments by all parties are to be made according to the terms and conditions of the four agreements.

IT IS THEREFORE the judgment of this Court that plaintiff, Christopher J. Roy, is hereby denied a declaratory judgment that the dissolution agreements created a partnership terminable at will. IT IS ALSO the judgment of this court that the plaintiffs-in-reconvention, Camille F. Gravel, Jr. and Richard V. Burnes, are hereby awarded the payment of all fees and expenses, present and future, due them by Christopher J. Roy pursuant to the terms of the dissolution agreements the

parties contracted to and to judgment that Christopher J. Roy must comply with all the terms of the agreement.

The rights of all parties are reserved to request liquidation and to require an accounting to establish a detailed list of the partnership assets and liabilities, including casework, as of January 19, 1980; the assignment of these pursuant to the dissolution agreements and any payments t hat have been made pursuant to the dissolution agreements. All costs of these proceedings are to be paid from partnership assets following liquidation. Attorney for Camille F. Gravel, Jr. and Richard V. Burnes is to prepare a - judgment in accordance with these reasons and present it for signing.

JUDGMENT RENDERED this 7th day of October, 1988, in Alexandria, Louisiana.

In their appellate brief before this Court the appellants declare that their basic argument is that the instrument by which the oral partnership was terminated was the creation of an inadvertent

partnership without a specific time for termination, thus was terminable at will provided due notice was given to the other partners.

As stated earlier, we affirm the conclusions of the trial court. The dissolution agreement was just what the parties called it, a dissolution agreement. In it they recognized that their former partnership had terminated at the close of the business day of January 19, 1980. The dissolution agreement was a detailed agreement between the three of them to govern the winding down of the affairs of the partnership.

[2] A private settlement and accounting of partnership affairs is binding on the parties consent thereto. Douglas v. Thomas, 489 So. 2d 449 (La. App. 4th Cir. 1986).

Contracts have the effect of law for the parties. La. C.C. art. 1983. Contracts must be performed in good faith. Id.

[3] The appellants further argue that even if the agreement was not a new partnership agreement, but a dissolution agreement, it nevertheless has no termination date and under the law presently codified in La. C.C. Art. 2024, it may be terminated at the will of any party by giving proper notice. We reject this argument because the dissolution agreement is not one without a specified duration. Its duration is necessarily coterminus with that of the fictional existence of the partnership, GRB. This court has previously stated:

> A dissolved partnership maintains a fictional existence with respect to its past transactions and existing assets, until all of its affairs are wound up and completed. This fictional existence permits the partnership to liquidate its affairs, perform existing contracts, collect its debts, pay its obligations and distribute its assets according to the partnership agreement.

Edco Properties v. Landry, 371 So. 2d 1367, 1373-1374 (La. App 3rd Cir. 1979), writ denied, 375 SO. 2d 945 (La. 1979). This rule was continued in La. C.C. Art. 2834, adopted in 1980 to become effective January 1, 1981: "A partnership retains its judicial personality for the purpose of liquidation." Thus, the partnership, GRB, continues to exist (even to this day apparently) and it doe snot go out of existence until all of its affairs are wound

up. The dissolution agreement has a temporal existence exactly the same as that of the partnership.

The appellants have raised a number of other assignments of error, which we will treat by way of memorandum opinion, giving our resolution of the issue and a brief statement of our reasons,in accordance with Rule 2-16, Uniform Rules--Courts of Appeal.

[4] Appellants complain that it was error for the trial court to deny their motion to sever the main demand and the reconventional demand, in order to allow the reconventional demand to be tried by a jury. It was appellants' position that the reconventional demand contained a claim for damages that could be tried by a jury. At the hearing on the motion, the reconvenors announced that they would not proceed on

their damage claim, but only on their accounting demands. The trial judge thereupon denied the demand for a partial jury trial. Aside from the fact that the appellants have failed to cite any authority that might support their right to make an ex parte demand for trial by jury of less than all issues in the case, the resolution of this assignment of error can be put at rest by a simple observation that there is not right to a jury trial in a suit involving the liquidation of a partnership. Ashley v. Welcker, 522 So. 2d 172 (La. App. 4th Cir. 1988).

[5] Roy complains that there is an inconsistency between the trial court's written and its formal judgment. The argument is that the money judgments awarded to Gravel and Burnes were "damages",

and that the trial court in reasons for judgment made no award of damages. We find no inconsistency. The judgments were in response to an accounting revealed in the evidence, and reconvenors' rights were recognized in the reasons for judgment.

[6] Another assignment of error is the overruling of the plaintiffs' exception of nonjoinder of indispensable parties. The indispensable parties were claimed to be the lawyers who joined Gravel and Burnes after the dissolution of GRB. This is not so. There were only three indispensable parties to this law suit: Roy, Gravel and Burnes.

does not tell us in what particular the trial judge applied the wrong law. We find that the trial court applied the correct substantive law to the case.

[7] The allowance of interest on the reimbursement awards to Gravel and Burnes, running from the dates Roy received the fees and expense reimbursements, is cited as error. We find that the trial court's award of interest was the result of a proper application of Cc. arts. 2000 and 2924, and was not error.

[8] While recognizing the general rule that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness (Rule 3.7, Rules of Professional Conduct), Roy seeks to invoke the exception, (Rule 3.7,(a)(3)), that his disqualification worked a substantial hardship on the client (his law

corporation). Christopher J. Roy complains that it was an abuse of discretion for the trial court to fail to permit him to represent Chris J. Roy (a law corporation) at the trial. For his side, Roy individually was the most part witness in the case. We find no abuse of discretion in the trial court's refusal to allow him to represent himself.

[9] The last two assignments of error can be discussed together. The first is the failure of the hearing judge, on a motion to recuse the trial judge, to recuse the trial judge from hearing a motion for a new trial. The second is the failure of the trial judge to grant a new trial. We find no merit to either of these assignments. Defendants' counsel, at the beginning of trial, gave the trial judge a collection of exhibits, for his handy reference, the admissibility of

which had been agreed upon at pretrial conferences. This collection was bound under a cover. Although the plaintiffs' counsel had copies of the same exhibits, counsel for defendants did not give to opposing counsel an identically bound copy, with a like cover, of these exhibits. After trial and after learning that the trial court had this bound copy of the exhibits, plaintiffs sought to recuse the trial judge from hearing the motion for a new trial, on the ground that the trial judge had been subject to improper influence by improper communications and was to prejudiced to be fair. A judge from an adjoining district heard the motion to recuse, and denied it. Thereupon, the trial judge resumed the bench and denied the motion for a new trial. After a careful consideration of the facts of the case, the innocuous contents of the "bench

book" (the collection of exhibits), and the circumstances, we perceive no error in the denial of the motion to recuse, no r is there error in the subsequent denial of the motion for a new trial.

Although our decision as to these assignments of error is expressed in the form of a memorandum opinion, our decision is based upon a careful reading of the record, and a careful consideration of the appellate briefs and the applicable law.

THE EXCEPTION OF NO CAUSE OF ACTION

[10] An exception of no cause of action, addressed to the reconventional demand of the defendants, Gravel and Burnes, was filed by the plaintiffs, Roy and his law

corporation, during the pendency of this appeal. We are authorized to consider this peremptory exception, even though filed for the first time in this court, if proof of the ground of the exception appears of record. La. C.C.P. art 2163. The ground of the exception, as argued by the exceptors, is the content of the dissolution agreement.

As stated earlier, the answer and reconventional demand of Gravel and Burnes alleged that the dissolution agreement was valid and enforceable and that the Roys had repeatedly breached it. The exception of no cause of action states that the following facts appear of record: The law partnership of Gravel, Roy and Burnes terminated on January 19, 1980; there were certain partnership agreements which entitled Gravel and Burnes to a share of fees earned after that date in cases formerly handled by the

partnership Gravel and Burnes have a proprietary interest in the cases formerly handled by the partnership, which are assets of that terminated partnership; and the agreements required Roy to handle to conclusion the partnership cases.

Roy claims that the dissolution agreement had an unlawful cause. The exception declares that if the agreement creates a proprietary interest on behalf of the parties in the case of action or subject matter of litigation, and restricts the right of the parties to practice law after the termination of the partnership relationship, and effects a division of fees between attorneys who are not in the same law firm without the division being made in proportion to services performed and without the clients being advised of the participation of the parties involved and

given a change to object, results are produced that are prohibited by law and reprobated by public policy. For this reason, according to Roy, the dissolution agreement is invalid and unenforceable and should be declared null and void.

The argument supporting this exception runs something like this: A partnership and the partners are separate beings. The partners may terminate a partnership by agreement between them. If this is done, the authority of the partners to act for the partnership ceases. Upon the termination of the partnership in this case, GRB, its property (i.e. its cases being handled for its clients) could not go to the partners, because that would have resulted in the acquisition by the partners of a proprietary interest in the cases, which is prohibited. Since the now demised juridical person known

as GRB likewise never had, or could acquire, a proprietary interest in the cases, the contingent fee contracts with the terminated legal entity were dissolved by operation of law. This being the case, neither the partnership nor its partners had any further interest in the attorney's fees in the case files. The clients were without lawyers, and new attorney-client relationships would have to be created. The foregoing argument is said to result from application of the Louisiana Rules of Professional Conduct, particularly Rule 1.8(j), which prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation of his client.

The exceptors buttress this argument with the proposition that when GRB terminated it was as if a lawyers had died.

They reason to this from the principles of mandate, pointing out that a mandate is terminated by operation of law upon the death of a principal or agent. Taking into account that the rights and obligations arising from contingent fee contracts being personal, are neither heritable nor assignable, the exceptors venture that these obligations expired by operation of law upon the demise of GRB.

Finally, it is contended that the dissolution agreement is a prohibited contract because it has a forbidden clause. This is no according to the exceptors' argument, not only because of the creation of a proprietary interest as discussed above, in violation of the Rules of Professional conduct, but also because it restricts the right of Roy and his

corporation to practice law after the termination of the partner- ship, in violation of Rule 5.6(a) and (b) of the Rules of Professional Conduct. Also, it effects a division of fees between the parties who are not in the same law firm, without the division being made in proportion to the services performed by each party involved and without the clients being advised of the participation of all the parties involved and given a change to object thereto, a suggested violation of Rule 1.5(e)(1) and (2) of the Rules of Professional Conduct.

In support of these arguments, the exceptors have cited a number of cases. We have read those cases, and, for the most part, they say exactly what exceptors attribute to them, and support the legal propositions for which they are offered. We

find that none of the cited cases, however, are applicable to the present case, and we overrule the exception of no cause of action for the following reasons.

[11] Exceptors' conclusions are based on a false premise, and that its the partnership terminated for all purposes on January 19, 1980. As we observed earlier in this opinion, citing and quoting from Edco Property vs. Landry, a dissolved partnership maintains a fictional existence until all of its affairs are wound up and completed. Accordingly, with respect to every incomplete case file, which is what this litigation is about, the partnership GRB is still very much in existence. Nor is it to correct to analogize the termination of a partnership to death of an individual partner. No actorney has died, and the partnership has not died. A partnership retains its juridical personality for "life"

for purposes of liquidation.

Art. 2834. Liquidation of the partnership.

In the absence of a contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.

A partnership retains it juridical personality for the purpose of liquidation.

Art. 2828. Continuation for liquidation; sole proprietorship.

When a partnership terminates, the business of the partnership ends except for purposes of liquidation.

If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

The business of GRB was the delivery of legal services. Its contractual relations with its clients did not end or terminate upon termination of the partnership.

> **Art. 2830. Effects of termination; authority of partners**
>
> When a partnership terminates, the authority of the partners to act for it ceases, except with regards to acts necessary to liquidate its affairs.

Comment (b) to this article reads:

> The activities of liquidation include the concluding of business transactions, the realization of assets, the paying of creditors and the division of net assets among the partners.

The performance of a contingent fee contract with a client is a business transaction. The contingent fee contracts pending at the time of terminations continued to be partnership

business after dissolution. These contracts were not, as contended by exceptors, dissolved. This kind of injustice resulting to clients of dissolving partnerships is unthinkable.

Based on the above observations and the basic principles of partnership law herein mentioned, the assertion that the dissolution agreement creates a proprietary interest in the subject mater of litigation is unfounded. The appellants do not claim that the contingency fee contracts <u>when entered into</u> were in violation of the Code of Professional Responsibility (which was in effect at the date of the dissolution agreement). If the contracts were not in violation at tne time they were entered into, they did not become in violation merely because the partnership terminated

because, as we have repeatedly said, GRB retained its juridical personality for purposes of winding up its affairs and concluding its partnership activities, including these contingency fee contracts.

By the same token, the termination of GRB had no effect on the right of the client to discharge GRB and get another lawyer. That right existed with equal force after the termination of the partnership as it did before.

With these things in mind, we fail to see how it can be said that the termination of the partnership agreement somehow restricted the right of any partner to practice law. The evidence discloses that the cases assigned to appellants under the

dissolution agreement were the same cases Roy had been handling before the partnership was terminated.

Finally, the provisions of the dissolution agreement which allocate fees generated from GRB contingency fee contracts do not violate Rule 1.5 of the Rules of Professional Conduct. This rule is aimed at full disclosure to the client by his attorney that another lawyer has been associated by the lawyer, and will be sharing in the fees. Fontenot & Mitchell v. Rozas, Manuel, etc., 425 So. 2d 259 (La. App. 3rd Cir. 1982), writ denied, 432 So. 2d 268 (La. 1983). This rule mandates that the client must agree to the association and further that in such cases the division of the fee must be proportionate to the work performed by each lawyer. Id. This rule,

now Rule 1.5, formerly Disciplinary Rule 2-107, was not violated in the present case. The contingency fee contracts were signed by the client and the law firm of GRB. The client knew that his case would be handled by one of the partners in the law firm, and therefore agreed to allow the law firm to split fees however the partners saw fit. As to each incomplete case file, GRB continues its existence.

The peremptory exception of no cause of action is overruled. The dissolution agreement doe snot have an unlawful cause.

For the above reasons, the judgment of the trial court is affirmed, and the exception of no cause of action filed in

this court is overruled. Appellants will pay the costs of this appeal.

JUDGMENT OF THE TRIAL COURT AFFIRMED; EXCEPTION OF NO CAUSE OF ACTION OVERRULED.

ON MOTION FOR REHEARING, AND ON THE PEREMPTORY EXCEPTION OF INDISPENSABLE PARTIES

PER CURIAM.

The motion for rehearing is denied.

[12] The pleading designated Peremptory Exception of Indispensable Parties, filed in this court following our decision on the appeal, is overruled. Plaintiffs-Exceptors assert that the partnership, GRB, was an indispensable party to this litigation, and that all of the partnership's clients were likewise indispensable parties to this litigation. We hold that the partnership and the clients were not indispensable parties to this litigation.

CIVIL SUIT NO. 123,079

CHRISTOPHER J. ROY	:	9TH JUDICIAL DIST CT
VERSUS	:	PARISH OF RAPIDES
CAMILLE F. GRAVEL, JR. AND RICHARD V. BURNES	:	STATE OF LOUISIANA

JUDGMENT

Trial of the plaintiffs' petition and amending petitions for declaratory judgment and the defendarts' recoventional demand was held on July 26, 26, & 27, 1998. Present for Christopher J. Roy and Chris J. Roy (A Law Corporation) was Leslie J. Schiff. Present for Camille F. Gravel, Jr. and Richard V. Burnes were Charles S. Weems, III and Amanda G.F. Palmer. Janice F. Roy did not appear. Considering the law, the evidence and the argument of counsel, for written reasons assigned on October 7, 1988.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Camille F. Gravel, Jr. and Richard V. Burnes and against Christopher J. Roy and Chris J. Roy (A Law Corporation), declaring that:

(1) Gravel, Burnes & Roy law partnership was disssolved as of January 19, 1980,

(2) The four dissolution agreements (the "Dissolution Agreements") entered into among Christopher J. Roy, Chris J. Roy (A Law Corporation), Camille F. Gravel, Jr. and Richard V. Burnes are valid, binding on and fully enforceable by the parties thereto, and

(3) Christopher J. Roy and Chris J. Roy (A Law Corporation) are required to comply with their obligations under the Dissolution Agreements.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of

Camille F. Gravel, Jr. and against Christopher J. Roy and Chris J. Roy (A Law Corporation) in solido, in the sumof $316,696.98, together with legal interest on the component parts of that sum (fees and expenses) from the dates of collection shown on Exhibit A (6 pages) until paid, subject to creditors for payments previously made by Christopher J. Roy in the amount of $12,000.00 on April 12, 1982 and $7,897.42 on June 1, 1982.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Richard V. Burnes and against Christopher J. Roy and Chris J. Roy (A Law Corporation) in solido, in the sum of $216,220.19, together with legal interest on the component parts of that sum (fees and expenses) from the dates of collection shown on Exhibit A (6

pages) until paid, subject to creditors for payments previously made by Christopher J. Roy in the amount of $12,000.00 on April 12, 1982 and $7,897.42 on June 1, 1982.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Camille F. Gravel, Jr. and Richard B. Burnes and against Christopher J. Roy and Chris J. Roy (A Law Corporation), ordering Chistopher J. Roy and Chris J. Roy (A Law Corporation) to perform the following in discharge of their obligations under the Dissolution Agreement.

a. Render a full, complete and detailed disclosure and accounting to Camille F. Gravel, Jr. and Ricahrd V. Burnes of the status and disposition of all Gravel, Roy & BUrnes cases listed on Exhibit B attached hereto and made a part hereof, such disclosure and accounting to include the name

of each client, names of opposing parties and opposing counsel, docket number, venue, status as settled, thried or pending, the amount of fees and expenses collected (if any), the manner of computing such fees, the dates of such collections, and all other facts necessary to give a complete and accurate disclosure and accounting commensurage with a partners' fiduciary duty to his partners. Such disclosure and accounting shall be in writing and shall be delivered to Camille F. Gravel, Jr. and Richard V. Burnes no later than thirty (30) days after this judgment is signed. A copy of such accounting and disclosure shall be filed with this Court at the same time. Jurisdiction is retained over any issue concerning the amount due by Christopher J. Roy and Chris J. Roy (A Law Corporation) to Camille F. Gravel, Jr. and Richard V. Burnes for fees and expenses on cases listed in Exhibit B hereto.

b. Immediately upon receipt of any fees and expenses paid in the Sylvia Lott vs. Louisiana Power and Light case, Docket No. 14,903, 28th Judicial District Court, now on Appeal in the Third Circuit Court of Appeal under Docket No. 87-1221 and under annuities and structured settlements, including those set forth in Exhibit C which is attached hereto and made part hereof, Christopher J. Roy and Chris J. Roy (A Law Corporation) shall deposit all

of such fees and expenses to the Gravel, Roy & Burns fund account established by the Dissolution Agreements and make a full, complete and detailed disclosure and accounting for such fees and expenses to Gravel and Burnes. The proportionate fees and expenses payable to each partner from such collections and from annuities and structural settlements shall be determined in accordance with the Dissolution Agreements. Any annuity or structured settlement of any Gravel, Roy & Burnes case which is not presently registred in the name of or styled as payable to Gravel, Roy & Burnes shall be re-registered in the name of or re-styled as payable to Gravel, Roy & Burnes as soon as this judgment becomes executory. Christopher J. Roy and Chris J. Roy (A Law Corporation) are ordered to obtain and execute instruments and do all other necessary acts to have such annuities and structured settlements so registered or styled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Camille P. Gravel, Jr. and Richard V. Burnes provide Christopher J. Roy with a list of the Gravel, Roy & Burnes

cases, on which Camille F. Gravel, Jr., and Richard B. Burnes agreed to complete case work, as of January 19, 1980.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of all parties to request additional accountings is reserved with respect to matters not adjudicated herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these proceedigns are to be paid from partnership assets prior to final liquidation of Gravel, Roy & Burnes.

JUDGMENT RENDERED October 7, 1988. JUDGMENT SIGNED in Alexandria, Louisiana, this 16th day of November, 1988.

/s/ W. T. McCain
W. T. McCain, Judge Ad Hoc

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4555

IN THE MATTER OF:
CHRIS J. ROY
Debtor

CHRIS J. ROY
Appellant

versus

CAMILLE F. GRAVEL, JR.,
and
RICHARD V. BURNES
Appellees

Appeal from the United States District Court
for the Western District of Louisiana

(91-1765)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Having reviewed the briefs and record, and having heard the oral argument of counsel, we conclude that the district court did not err in affirming the bankruptcy court's determination of non-dischargeability under 11 U.S.C. Section 523(a)(4) and (6). It is obvious that the debtor, Chris Roy, failed to fulfill his legal obligations regarding the funds in question, so the statutory requirement for non-dischargeability is plainly met.

The judgment of the district court is AFFIRMED.

WESTERN STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

IN RE: CASE NO. 89 BK-80155

CHRIS J. ROY, A LAW
CORPORATION
(Debtor)

IN RE:

CHRIS J. ROY CASE NO. 89BK-80143
(Debtor)

****

CAMILLE F. GRAVEL, JR.
RICHARD V. BURNES
(Plaintiffs)

VS.

CHRIS J. ROY ADVERSARY NO:89AP-8044
A LAW CORPORATION Consolidated with
ADVERSARY NO:91AP-8006

AND

CHRIS J. ROY
(Defendant)

JUDGMENT

Pursuant to separate Reasons for Decision assigned this date:

IT IS ORDERED, ADJUDGED AND DECREED that there be and is hereby judgment in favor of the plaintiffs, Camille F. Gravel, Jr., and Richard V. Burnes, and against the defendant, Chris J. Roy, decreeing all sums due plaintiffs as set forth in the Judgment of the Ninth Judicial District Court for the Parish of Rapides in Civil Suit No. 123,079, a copy of which is attached hereto, to be non-dischargeable under 11 U.S.C. Section 523 (a) (4) and (a) (6).

The demands of the plaintiffs against Chris J. Roy, a Law Corporation are rejected.

ALEXANDRIA, LOUISIANA this 1st day of July, 1991.

/s/ HENLEY A. HUNTER

JUDGE
U. S. BANKRUPTCY COURT

WESTERN STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

IN RE: CASE NO. 89 BK-80155

CHRIS J. ROY, A LAW
CORPORATION
(Debtor)

IN RE:

CHRIS J. ROY CASE NO. 89BK-80143
(Debtor)

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CAMILLE F. GRAVEL, JR.
RICHARD V. BURNES
(Plaintiffs)

VS.

CHRIS J. ROY ADVERSARY NO:89AP-8044
A LAW CORPORATION Consolidated with
ADVERSARY NO:91AP-8006

AND

CHRIS J. ROY
(Defendant)

REASONS FOR DECISION

These matters come before the Court for a determination of the dischargeability of a

debt. This is a Core Proceeding pursuant to 28 U.S.C. Section 157 (b) (2) (I) inasmuch as it involves the determination of the dischargeability of particular debts. For the following reasons, there will be judgment for plaintiffs against the individual defendant, but rejecting the demands against the corporate defendant.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1334 and by virtue of the reference by the District Court pursuant to Local District court Rule 22.1 incorporated into Local Bankruptcy Rule 1.2. No party at interest has sought to withdraw the reference to the Bankruptcy Court, nor has the District Court done so on its own motion. This Court makes the following findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. BACKGROUND

These proceedings were instituted by the plaintiffs, Camille F. Gravel, Jr., and Richard V. Burnes against the debtors, Christopher J. Roy (individually) and Chris J. Roy, a Law Corporation. These debtors originally filed voluntary petitions for relief under Chapter 11 on February 6, 1989 and February 8, 1989, respectively. Both cases were later converted to Chapter 7.

The parties here were partners in a law firm known as Gravel, Roy and Burnes ("GRB") which operated for a period of approximately ten years between 1970 and 1980 under an oral partnership agreement. In January of 1980, Roy gave notice of his intention to withdraw from the partnership. Various written agreements were executed regarding

the dissolution of the partnership. Those agreements have been the subject of extensive litigation.

In 1982, Roy instituted a suit for a declaratory judgment in the 9th Judicial District Court for Rapides Parish under Docket No. 123,079 seeking a declaration that the agreements constituted a partnership and were terminable at will. Gravel and Burnes filed a reconventional demand for an accounting, specific performance and damages. The trial court entered Reasons for Judgment on October 7, 1988. A Judgment was entered on November 16, 1988. For an understanding of the trial court's findings, it is sufficient to quote from the joint Pre-Trial Stipulation of the parties which, in pertinent part, reads as follows:

"After extended pre-trial motions and discovery the state court trial was held on July 26, 27, and 28, 1988. For written reasons assigned October 7, 1988, the trial court in judgment signed November 16, 1988, ruled in favor of Gravel and Burnes, and against Roy, on all material issues, holding:

(1) that the partnership Gravel, Roy and Burnes was dissolved as of January 19, 1980;
(2) that the Dissolution Agreement entered into by the parties was valid, binding and fully enforceable;
(3) that Roy and his law corporation were required to perform in accordance with the Dissolution Agreement;
(4) that Gravel was entitled to judgment against Chris J. Roy and Chris J. Roy, A Law Corporation, in solido, in the amount of $316,696.98, subject to certain credits;
(5) that Burnes was entitled to a judgment against Chris J. Roy and Chris J. Roy, A Law Corporation, in solido, in the amount of $216,220.19, subject to certain credits; and,

(6) requiring Roy to account for certain other GRB cases, and directing the manner in which future performance should occur under the dissolution Agreement."[1]

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1 The Pre-Trial Stipulation continues by reciting that the judgment of the trial court was affirmed by the Third Circuit Court of Appeal, State of Louisiana, and that the Supreme Court of Louisiana denied writs. Then the stipulation recites "...[t]his judgment is not final and executory." This statement is incorrect and must be read "now final and executory." See Article 2166, Code of Civil Procedure.

An appeal followed to the Court of Appeal, Third Circuit, State of Louisiana, which affirmed the decision of the trial court and assigned written reasons on October 3, 1990. See Roy v Gravel, 570 So. 2d 1175 (La. App. 3d Cir. 1990). Writs were denied by the Supreme Court of the State of Louisiana on January 18, 1991. See Roy v Gravel, 573 So. 2d 1118 (La. 1991).

This matter was set for trial on May 24, 1991, before the undersigned. The entire record in the State Court proceedings was introduced as a joint exhibit and further testimony was adduced. The matter was taken under advisement and briefs were filed by the plaintiffs and the individual defendant, Chris J. Roy. The parties stipulated that the facts found by the state courts were correct. This Court has read the tran-

scripts in the state court proceedings in their entirety. A copy of the Reasons for Judgment of the trial court is attached as Exhibit A to the "Addendum to Disclosure Statement," filed by debtor on November 7, 1989, in Bankruptcy Case #89-80143-All. A copy of the judgment of the trial court is attached hereto as an Appendix.

B. CONTENTIONS OF THE PARTIES

The Plaintiffs assert that the claims represented by the judgment are non-dischargeable under 11 U.S.C. 523(a)(4) and (6) inasmuch as plaintiffs maintain the claims arose by virtue of a defalcation while acting in a fiduciary capacity and/or were for willful and malicious injury to another person or the property of another person. Defendant maintains that his actions constitute a simple breach of contract, that

"the determination of a fiduciary relationship between partners must be determined by both state law and federal bankruptcy law concepts," and that the actions of debtor do not constitute a defalcation or a willful and malicious injury to another person or to the property of another person.

C. APPLICABLE LAW

(1) Defalcation in a Fiduciary Capacity

Generally, the requisite proof in an action under Section 523 is now conclusively established to be a preponderance of the evidence. See Grogan v Garner, 498 U.S. ___, 111 S.Ct. ___, 112 L Ed.2d 775 (1991). Compare: Matter of Foreman, 906 F.2d 123 (5th Cir. 1990).

The exception to the discharge presently recognized in 11 U.S.C. 523 (a)(4) first

appeared in the Bankruptcy Act of 1898 at which time the provision excepted from discharge those debts "created by [a debtor's] fraud, embezzlement, defalcation or misappropriation while acting as an officer or in any fiduciary capacity." Section 17 (a)(4) of the Bankruptcy Act. his provision of the Bankruptcy Act and the present Code provision encompass a dual inquiry into both state and federal law questions, which inquiry has been described as follows:

> "The Authority to regulate bankruptcy is granted exclusively to the federal government in the Constitution. The meaning of the Bankruptcy Code is determined by the intent of Congress in adopting the Code. It is clear that it is a question of federal law as to the meanings of the terms 'defalcation' and 'fiduciary,' both of which are central to the exception to discharge for defalcation while acting in a fiduciary capacity. State law may be a factor in the decision of a bankruptcy court, particularly

> in establishing the legal basis for the trust relations. The interplay between federal and state law involves the determination by a bankruptcy court that a fiduciary relationship is established by state law, that the trust falls within the meaning of that term as allowed in bankruptcy proceedings, and that a defalcation as interpreted by federal law occurred."

Summers, The Exception to Discharge in Bankruptcy for Defalcation by a Fiduciary, 92 Commercial Law Journal (No. 3, 1987, pages 316-317 (footnotes omitted) [hereinafter "Summers"]. These Reasons for Decision will now address the "defalcation" inquiry.

(a) Defalcation

The term "defalcation" was defined by Judgment Learned Hand as follows:

"Colloquially perhaps the word 'defalcation' would nearly imply some moral dereliction, but in this context it may have included innocent defaults, so as to include all fiduciaries who for any reason were short in their account...he is guilty of 'defalcation' though it may not be a 'fraud,' or 'embezzlement,' or perhaps not even a 'misappropriation.'"

Summers, supra, page 317 quoting Central Hanover Bank & Trust Co. v Herbst, 93 F.2d 510, at 511-12 (2nd Cir. 1937) page 317. In Herbst, a receiver received and expended funds which a court had allowed him as commissions prior to the time the order approving same was final. The order did not survive an appeal, and the resultant claim against the receiver was determined non-dischargeable in bankruptcy. IN In re: Crosswhite, 91 B.R. 156 (Bkrtcy. M.D. Fla. 1988) the Court observed:

> "For purposes of Section 523(a)(4) defalcation while acting in a fiduciary capacity is defined as 'the slightest misconduct, and it need not be intentional conduct; negligence or ignorance may be defalcation.' Morales v Codias, 78 B.R. 162 (Bkrtcy. S.C. 1984).
>
> Further, a defalcation may exist where even the merest deficit is caused by the Debtor's misconduct, even if the Debtor's conduct does not benefit him..." 91 B.R. 156, 160.

Thus, it would appear that a defalcation may be established by a lesser showing than that required for fraud, embezzlement, or larceny, with less of a "regard to intent or motive...[which] is consistent with the general policy in bankruptcy of giving an honest debtor a fresh start, since the higher standards and duties imposed by the fiduciary relationship require a higher standard of performance by the fiduciary. Some courts have held that defalcation

requires a 'knowing misappropriation' or at lease a knowledge of the duty to act as a fiduciary." Summers, page 318.

In Matter of Moreno, 892 F.2d 417 I5th Cir. 1990) the Fifth Circuit observed that "[a] defalcation is a willful neglect of duty, even if not accompanied by fraud or embezzlement." A prior Fifth Circuit holding in Carey Lumber Company v Bell, 615 F.2d 370 (1980), dealing with former Section 17(a)(4) of the Bankruptcy Act, noted that the debtor was "charged with knowledge of his legal duties under the lien trust laws..." Ibid, Page 376.

The inquiry, however, does not end here, inasmuch as the plaintiffs must also establish that a fiduciary relationship existed between the parties. These Reasons for Decision now address the scope of that inquiry.

(b) Fiduciary Capacity

Contrasted with the relative ease of establishing a defalcation, the next inquiry requires the plaintiffs to establish that a technical or express trust existed. The historic definition of the term bankruptcy lies in the case of the Davis v Aetna Acceptance Co., 293 U.S. 328, 55 S.Ct. 151 (1934), in which the Supreme Court determined that the exception does not apply to trusts ex maleficio which arise from the wrongdoing out of which the debt arose. A constructive trust is not sufficient to create a fiduciary relationship. Matter of Angelle, 610 F.2d 1335 (5th Cir. 1980). Further, while the "scope of concept 'fiduciary'" is determined by federal law, state law in turn "takes on importance in determining when a trust exists. The state

may impose trust-like obligations on those entering into certain types of obligations, and these obligations may make a contracting party a trustee. Of course, the trust must arise prior to and without reference to the act creating the debt. We also believe that state law may play importance in determining whether a specific case involves an express trust." 610 F.2d, 1341. See also Carey Lumber Co. v Bell, supra.

Summers' discussion of legal relationships reviewable under 11 U.S.C. 523(a)(4) includes (at page 325) the relationship of a partner to the partnership, citing at the footnote Ragsdale v Haller, 780 F.2d 794 (9th Cir. 1986) and In re Hurbace, 61 B.R. 563 (Bankr. W.D. Tex. 1986).

Cases considering the dischargeability of a former partner's debts are numerous. These Reasons for Decision will address only a few. In re Stone, 90 B.R. 71 (Bkrtcy. S.D. N.Y. 1988) finds a former business partner's debts non-dischargeable and also, while noting that the bankruptcy court makes the ultimate determination on dischargeability, invokes the doctrine of collateral estoppel to bar relitigation of the factual issues underlying that determination, citing In re Wallace, 840 F.2d 762 at 764, and Carey Lumber Co. v Bell, supra. A similar result was reached in In re Tsamasfyros, 114 B.R. 721 (D. Colo. 1990), which also observed that if the judgment of the state court is given preclusive effect, the calculation of damages may not be attacked in the

bankruptcy case. In In re Stewart, 123 B.R. 817 (Bkrtcy. W.D. Tenn. 1991), the Court, applying Tennessee law, found a partner's debt to be non-dischargeable as a defalcation, relying on Summers and the Sixth circuit's holding in Johnson, supra.

Cases determining the debt to be dischargeable notwithstanding section 523(a)(4) generally do so where the state law does not support a fiduciary duty to the plaintiffs and/or the trust is one that arises ex maleficio. Matter of McCraney, 63 B.R. 64 (Bkrtcy. N.D. Ala. 1986) determined that an insurance agent was not a fiduciary of the company to which the premiums were owed. In re Weidenhammer, 82 B.R. 383 (Bkrtcy. E.D. Pa. 1988) found no duty of partners to each other under New Jersey law. See also In re Napoli, 82 B.R. 378 (Bkrtcy.

E.D. Pa. 1988). In In re Eames, 108 B.R. 742 (Bkrtcy. D. Mont. 1990) the court found that a partnership could not prevail against a partner in a dischargeability action beca e, under the applicable law, the trust duty arose ex maleficio, i.e., only when the partner derived profits without the consent of the partnership. That finding was, however, of cold comfort to the debtor, since the court found that the debt due the partnership was non-dischargeable under 523(a)(6). In re Crosswhite, supra, found the debt of a partner to his former partner non-dischargeable as an embezzlement, observing that the partnership itself "would have a viable claim" (at page 159) but found for the plaintiff-partner as to a defalcation under North Carolina law.

In an opinion that appears to reflect a minority view, the Court in In re Reeves, 124 B.R. 5 (Bankr. N.H. 1990), held that the concept of a fiduciary under the Bankruptcy code was narrower than the concept under the state law and excluded partners, despite state controlled. The Reeves Court held that there was no evidence of a formal or express trust between the parties.

In Louisiana the fiduciary duty of a partner runs not only to the partnership but also to the partners. The rule is clearly stated in Louisiana Civil Code Article 2809 as follows:

> "A partner owes a fiduciary duty to the partnership and to his partners. He

> may not conduct any activity, for himself or on behalf of a third person, that is contrary to his fiduciary duty and is prejudicial to the partnership. If he does so, he must account to the partnership and to his partners for the resulting profits."

Although that article was enacted in 1980, it is based on prior articles in the Civil Code of 1870. The case law prior to 1980 also imposes a fiduciary duty of partners in their dealings with one another. See e.g. Henly v Haynes, 376 So.2d 1030 (1st Cir. 1979); W.A. McMichael Const. Co. v D & W Properties, Inc., 356 So.2d 1115 (2d Cir. 1978).

2. Willful and Malicious Injury

Plaintiffs further urge as an additional or alternative remedy the theory that defendant is not entitled to a discharge from a debt "for willful and malicious injury by the debtor to another entity or to

the property of another entity." In Chrysler Credit Corp. v Perry Chrysler Plymouth, 783 F.2d 480 (5th Cir. 1986), the Fifth Circuit, after an extensive analysis of Louisiana delictual actions relative to ownership of movables, concluded that where a corporate officer was required to segregate sale proceeds affected by a floor plan mortgage from the corporation's general funds, and transfer same to the lender, a diversion of the funds to the officer's own personal use constituted a conversion of same apart from his personal liability as a corporate officer, which liability sounded in tort.

As noted supra, bankruptcy courts considering 523(a)(4) sometimes address 523(a)(6), occasionally affording relief under the latter provision where it is

denied under the former. The Fifth Circuit reached a similar result where it concluded that the proof of a corporate officer's negligence was insufficient to hold him personally liable for an entire corporate debt but held that a portion of the same which he had taken to Las Vegas for gambling was non-dischargeable as a tortious conversion. Chrysler Credit supra. In that matter, the Court described the remedy in Louisiana as follows:

> "In Louisiana, delictual actions based on unlawful interference with the ownership or possession of movables are frequently termed actions for 'conversion." The Louisiana Court of Appeals has said, '[t]he common law tort of conversion--a distinct act of dominion wrongfully exerted over another's property in denial of or inconsistent with the owner's rights therein--has been offense or quasi offense under LSA-CC 2315. Despite the similarity in labels, the Louisiana action is only rarely completely identifiable with actions based on the common-law tort. In this area, therefore, as Professor A.N. Yiannopoulas has written, the law of

Louisiana appears to be a hybrid, with characteristics borrowed from both the common law and the civil law. The Louisiana Supreme Court held in Importsales, Inc., v Lindeman that Louisiana does, however, recognize a cause of action for the wrongful act of repudiation of the owner's right to property, or some exercise of dominion over it inconsistent with the owner's right. Explaining the basis for this cause of action, Louisiana courts have cited with approval Dean Prosser's analysis:

> 'The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights . . . Persons . . . exercise acts of ownership at their peril, and must take the risk that there is no lawful justification for their acts.'

Thus, the focus is on the act committed in order to determine whether it constitutes a tort; whether the act was done intentionally or negligently is of no moment."

783 F.2d 480, pages 483-484, footnotes omitted.

Having discussed the applicable law regarding those exceptions to the discharge on which the plaintiffs rely, these Reasons for Decision now address the actions of the debtor, first addressing the plaintiff's claims that debtor committed a defalcation while in a fiduciary capacity.

D. WAS THERE A DEFALCATION WHILE ACTING IN A FIDUCIARY CAPACITY?

In view of the stipulation of the parties that the facts as found by the state courts are correct, according collateral estoppel to those findings is appropriate. Carey Lumber Co. v Bell, supra. The trial court described debtor's conduct with regard to performance under the agreements as follows:

"For a period of time, Roy performed in accordance with the agreements, and as the casework assumed by him was completed, the fees were duly accounted for under the terms of the agreement. In December 1980, Roy notified Gravel and Burnes that the dissolution agreements were unsatisfactory and that, as a partner, he was terminating the relationship. Roy still continued through 1981 to settle some casework assumed by him and account for the fees paid, pursuant to the terms of the agreement. In September 1981, Roy again wrote Gravel and Burnes and indicated he would no longer handle cases of the former partnership. Roy wrote to Gravel and Burnes again in April 1982 and reiterated his intention to work no further on casework of the former partnership. Following his April 1982 notification, Roy ceased to comply with the terms of the agreement and has taken no further action to conclude the cases provided for in the agreement or to deposit any fees paid under the terms of the agreement."

Reasons for Judgment, page 2, quoted by the Third Circuit at 520 So.2d 1175 at 1178.

Counsel for Debtor argues as follows:

"The recent case of Matter of Moreno, 892 F.2d 417 (5th Cir. 1990) fixed the Fifth Circuit standard for defalcations, that being 'willful neglect of duty, even if not accompanied by fraud or embezzlement.' This standard requires intent to violate a known duty. Did Chris Roy intent to violate a known duty? It is submitted that he did not.

The Court of Appeals confirmed that the clients could discharge the partnership at any time--even after termination of the partnership. See judgment of Third Circuit Court of Appeals in record. When the original partnership was discharged by the individual clients (the testimony of which is uncontroverted at the trial court level, Transcript p. 45), Chris Roy considered his duty to his former partners terminated relative to those cases. Thereafter, he paid to his former partners the Court costs advances of the former partnership only. The actions which the plaintiffs complain of all occurred after the discharge of the former partnership by the various clients. If Chris Roy did not consider that he had any duty to his former partners (testimony of Chris Roy at dischargeability hearing), how could he ever commit a willful neglect of that duty? His actions were willful, but were not performed as a conscious neglect of a known duty. Chris Roy could have only had the intent to violate a duty if he felt he was a fiduciary with a duty, which he did not.

> This is evidenced by his testimony and his conscious actions not to cash the checks of Gravel and Burnes."

Post-Trial memorandum, pages 6-7.

Debtor's argument under Moreno must fail. Contrary to debtor's assertion, that case held only that a defalcation was a "willful neglect of duty." It did not impose a non-dischargeability burden of proving that debtor had both a fore-knowledge of the duty and an intent to violate same. Moreno is silent regarding debtor's knowledge of his duty. In that case, after first noting that the debtor there did not dispute the fact that he owned a fiduciary duty to his former employer, the Court observed that "[t]his duty encompassed, at least, a responsibility not to lend ...[the employer's] money to himself or corporations controlled by him on less

than an arms-length basis..." Nothing in Moreno disapproves of the prior holding in Bell charging the debtor with knowledge of his duty irrespective of scienter. Bell further noted that there was no requirement that the misappropriation be shown to be intentional or that the funds be diverted to the bankrupt's own benefit. Debtor here clearly enjoyed the fruits of the ill-gotten gains. Moreover, the Fifth Circuit's opinion in Bell casts doubt as to the continuing viability of "the rule that a mistake of fact may Bankruptcy Act]..." Ibid. page 376.2 Here, debtor has conceded the accuracy of the State court findings of fact, which scarcely favor debtor.

Although the Fifth Circuit does not designate its test for defalcation as an objective one, of the Courts, in adopting

the Bell test, have so described the test. See E.G., In re Johnson, 691 F.2d 249 (6th Cir. 1982), which, relying on Carey v Bell, described the standard as follows:

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2 Section 523(a)(4) is the successor of Section 17(a)(4) of the Bankruptcy Act.

> "An objective standard for finding a defalcation, that does charge a bankrupt with knowledge of the law and that does not weigh intent or motive, is consistent with the policy behind the bankruptcy laws of giving an honest debtor the opportunity for economic rehabilitation. See Local Loan Co. v. Hunt, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934). Exceptions to the general rule of discharge exist for certain types of 'bad acts.' See 11 U.S.C. Sections 34(a)(2), (4), (8). Although the 'badness of fraud, embezzlement or misappropriation is readily apparent, creating a debt by breaching a fiduciary duty is a sufficiently bad act to invoke the section 17(a)(4) exception even without a subjective mental state evidencing intent to breach a known fiduciary duty or bad faith in doing so. This is

because the requisite 'badness,' to conform with the spirit of the bankruptcy laws, is supplied by an individual's special legal status with respect to another, with its attendant duties and high standards of dealing, and the act of breaching these duties.'

691 F.2d 249, 252-256.

"Finally, measuring 'defalcation' against an objective standard prevents ignorance of the law from becoming a defense to nondischargeability and provides an incentive for individuals, such as Johnson, who are engaged in occupations subject to special statutes to apprise themselves of their obligations under the law.

For the above-mentioned reasons, we conclude that a bankrupt is chargeable with knowledge of the law. The character of the liability imposed upon a fiduciary for appropriating property held by him in trust is the same whether he has actual knowledge that the law imposes the duty or is merely charged with such knowledge. We hold that the objective fact that monies paid into the building contract fund were used for purposes other than to pay laborers, subcontractors or materialmen first is sufficient to constitute a defalcation under section 17(a)(4) so long as the use was not the result of mere negligence or a mistake of fact; subjective intent to violate a known fiduciary duty or a bad faith is irrelevant."

691 F.2d 249, at 257 (footnote omitted.)

An objective standard in this regard is totally consistent with the intention of congress in carving out certain exceptions to discharge for categories of debts for which the creditor's interest in repayment outweigh the debtor's interest in a fresh start. Grogan v Garner, supra.

Counsel for debtor argues that debtor perceived that his duty to his former partners terminated with the discharge of the former partnership by the clients. Since debtor is charged with the duty here, irrespective of his knowledge or lack thereof, this argument must fail.

It is sufficient here that Roy's acts were willful, for he is charged with the knowledge of the duty. Nor does this Court find any redeeming effect, as argued by

counsel to debtor, in the fact that debtor did not cash the checks (totaling some $12,000.00) sent to him by Gravel and Burnes but held them until such time as he surrendered them to his trustee in bankruptcy. Debtor failed to account for the much larger sums for which these plaintiffs have already received judgment. suffice it to say here that, had debtor been sincere in this regard, as counsel for plaintiffs argue,

> "[h]e could have segregated and maintained the funds for later direction by the Court if he felt he has some legitimate legal reason for failing to deliver the money, but he chose not to do so, apparently thinking that he could expend his partner's money for his personal use and benefit with impunity." Plaintiff's Post Trial Memorandum, page 17.

Moreover, debtor's protestations of innocence here are directed to his

misperception of his duty, based upon his interpretation of the legal effect of the dissolution of the original partnership, this despite the unequivocal holding of the state court that the partnership continued a fictional existence for dissolution purposes. These Reasons for Decision find no support for converting his ignorance of the law, or mistake in law, into a mistake of fact.

Whether a fiduciary relationship existed prior to the misappropriation is the next issue under the defalcation analysis. It is significant in the instant case that the trial and appellate decisions both recognized the binding nature of the contracts or dissolution agreements at issue as arising under applicable partnership law. In its opinion, the Third Circuit observed:

"As stated earlier, we affirm the conclusions of the trial court. The dissolution agreement was just what the parties called it, a dissolution agreement. In it they recognized that their former partnership had terminated at the close of the business day of January 19, 1990. The dissolution agreement was a detailed agreement between the three of them to govern the winding down of the affairs of the partnership.

A private settlement and accounting of partnership affairs is binding on the parties consenting thereto. Douglas v. Thomas, 489 So.2d 449 (La. App. 4th Cir. 1986). Contracts have the effect of law for the parties. La. C.C. art. 1983. contracts must be performed in good faith. Id.

The appellants further argue that even if the agreement was not a new partnership agreement, but a dissolution agreement, it nevertheless has no termination date and under the law presently codified in La. C.C. art. 2024, it may be terminated at the will of any party by giving proper notice. We reject this argument because the dissolution agreement is not one without a specified duration. Its duration is necessarily coterminous with that of the fictional existence of the partnership, GRB. This court has previously stated:

> A dissolved partnership maintains a fictional existence with respect to its past transactions and existing assets, until all of its affairs are wound up and completed. This fictional existence permits the partnership to liquidate its affairs, perform existing contract, collect its debts, pay its obligations and distribute its assets according to the partnership agreement.
>
> Edco Properties v. Landry, 371 So.2d, 1367, 1373-1374 (La. App. 3rd Cir. 1979), writ denied, 374 So. 2d 945 (La. 1979). This rule was continued in La. C.C. art. 2834, adopted in 1980 to become effective January 1, 1981: 'A partnership retains it's juridical personality for the purpose of liquidation.' Thus, the partnership, GRB, continues to exist (even to this day apparently) and it does not go out of existence until all of its affairs are wound up. The dissolution agreement has a temporal existence exactly the same as that of the partnership."

570 So.2d 1174 at 1181.

These reasons for decision have previously set forth the tests under the law

for concluding that a fiduciary relationship exists. Applying those tests to the stipulated facts and considering the foregoing analysis of the contracts by the state courts, the conclusion is inescapable that Roy was charged with a duty to the plaintiffs under 11 U.S.C. 523(a)(4) and as a fiduciary under Louisiana law, and that the duty was breached. Even were this Court to adopt the position taken by the Reeves Court, supra, holding that state law is not an appropriate consideration, on these facts the express undertaking by contract of these parties would appear to satisfy even that Court.

Accordingly, the indebtedness represented by the judgment entered by the Ninth Judicial District Court, as affirmed by the Third Circuit Court of Appeal, writs

having been denied by the Supreme Court of Louisiana, is determined to be non-dischargeable in the bankruptcy case of Chris J. Roy, Sr., pursuant to 11 U.S.C. Section 523(a)(4). Since only an individual is eligible for a discharge under 11 U.S.C. 727(a)(1), all demands against Chris J. Roy, A Law Corporation, must be denied. These Reasons for Decision will now address whether the indebtedness is also non-dischargeable as to the individual debtor under 11 U.S.C. 523(a)(6).

E. WAS THERE WILLFUL AND MALICIOUS INJURY?

Plaintiffs rely upon the holding in Chrysler Credit, supra, in suggesting that Section 523(a)(6) excepts Roy's debts from discharge. Counsel for debtor somewhat blithely asserts that that section has "consistently been held...[to] relate...to

torts and not to contracts," citing 3 Collier on Bankruptcy (15th Ed. 1991). This oversimplified assertion ignores not only Chrysler Credit but also the cases dealing with partnerships, supra.

From the findings of the state court, as noted previously, there can be no doubt that Roy's acts or inactions in this matter were willful and that he exercised dominion over the cases which comprised assets of GRB. This was inconsistent with the rights of the plaintiffs. Chrysler Credit, supra. Lest there be any doubt as to the willfulness of debtor's actions, the rationale for debtor's decision is reproduced below in his own words. In exhibit Gravel 12, a memorandum from debtor to plaintiffs, debtor writes as follows:

"Camille and Richard
Re: CASES
Camille and Richard, I hate to keep complaining, but I have finally reached my wit's end. I can no longer work the cases I am working and spend the time away from my office that they necessitate for the little that I receive in return. I am physically tired, and it appears that no amount of speaking with you all changes anything, and I suppose that is the way it will be.

For instance, it was agreed that some type of rent, at least the amount to pay the note on the office, etc. would have been forthcoming; however, nothing has been done in that regard, and any questions with respect to my receiving a fair share for my work are met with some type of case comparison studies to be made. When we entered into the agreement, I felt that both of you would be practicing together and that the amount of work which I would produce would be equal if not exceeded by what remained at the firm; that has not been the case. I do not mind working for our former clients; however, I cannot see Camille's receiving 30% on each case for cases worked by his employees, whereas I receive nothing for my time.

In any event, since I physically cannot continue at this pace, it appears to me appropriate that we compose a letter to the clients who remain and inform them

> of their choices to (1) retain whomever they wish in the former firm; (2) discharge all members of the former firm and retain counsel for their choice; and/or (3) make an agreement which would compensate me for my time and effort which cannot possibly be itemized on a day to day basis so that whatever cases I work, I get the same 30% that Camille gets. . . .

In the trial court debtor testified as follows:

> Q. "And so then in April 1982 you just finally stopped (Interrupted)
>
> A. '82...by that time I was at my wit's end and...I had been working on the cases that were coming up in '82 for several years, by that time I was spending my own money on some of them and my other law firm to get them to the position of settling. Clients were writing them letters and telling them they didn't want them. Clients were retaining me, according to the agreement as I saw it and according to what we had understood, and as a consequence of that I just finally stopped it."
>
> Trial transcript, page 58, lines 14-25.

These Reasons for Decision now address whether debtor's conduct was malicious, i.e., "without just cause of excuse."

Chrysler Credit, page 486. In the state courts, he unsuccessfully defended his course of action on various theories falling into two categories. One category of theories was based on debtor's interpretation of the partnership agreement and its legal effect. For example, debtor contended the agreements were terminable at will. The trial court expressly rejected this contention at page 4 of its opinion. A similar theory, that an inadvertent partnership was created by the agreement, died a similar death in the trial court's opinion, also at page 4.

Roy's second category of theories centered on the contention that there were ethical problems with the contractual relationship based upon his interpretation of the Code of Professional Responsibility.

The Third Circuit also rejected these contentions, noting as follows:

> "With these things in mind, we fail to see how it can be said that the termination of the partnership agreements somehow restricted the right of any partner to practice law...
>
> Finally, the provisions of the dissolution agreement which allocate fees generated from GRB contingency fee contracts do not violate Rule 1.5 of the Rules of Professional Conduct...."

570 So.2d 1175 at 1185.

On the ethical matters, during the hearing before this Court on the trial date, Roy again urged his ethical beliefs regarding his actions, referring to same while observing that once he left the law firm in 1980, he was forced to pay the costs of operating his own office, and was in fact making less money than he previously earned. During that testimony, he again used the phrase" [at his] wit's end," which appears in both the memorandum and trial court testimony set forth above. Taken in

the context in which the references were made, it appears that debtor was continually at his wit's end, due not to considerations arising from ethical concerns or relating to his contentions regarding the viability or enforceability of the agreements, but clearly due only to the perception that he was not receiving what he considered to be appropriate compensation for performing his obligations to the plaintiffs. In the final analysis, debtor's ethical considerations were at all pertinent times, including during the hearing in this Court, mere window-dressings, obfuscating debtor's desire to extricate himself from an unsatisfactory business arrangement of his own making. No just cause or excuse is here served.

Accordingly, these Reasons for Decision conclude that the actions of the individual debtor here constituted willful and malicious conduct under 11 U.S.C. 523(a)(6). Inasmuch as a corporation is not entitled to a discharge under Section 727, as set forth above, the conclusion reached as to the corporate debtor on the 523(a)(4) issue is also reached as to the 523(a)(6) issue.

CONCLUSION

For the reasons previously set forth, the demand of the plaintiffs against the defendant Chris J. Roy, A Law Corporation are **rejected**. There will be judgment herein in favor of the plaintiffs and against the defendant Chris J. Roy, decreeing the debts due the plaintiffs, in accordance with the

judgment rendered by the Ninth Judicial District court in Suit No. 123,079, non-dischargeable. A separate, conforming judgment will enter.

ALEXANDRIA, LOUISIANA, this 1st day of July, 1991.

/s/ HENLEY A. HUNTER
HENLEY A. HUNTER, JUDGE
U. S. BANKRUPTCY COURT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CHRISTOPHER J. ROY

CIVIL ACTION NO. 91-1765

-vs-

SECTION "A" (JUDGE LITTLE)

CAMILLE F. GRAVEL, JR.
and RICHARD V. BURNES

R U L I N G

An adverse ruling of the bankruptcy court causes Christopher J. Roy to appeal to the federal district court. Roy invites this court to overturn the bankruptcy court's determination that Roy's debts to his former partners are not dischargeable. We decline the invitation and AFFIRM the decision from the bankruptcy court.

Camille Gravel, Christopher J. Roy, and Richard V. Burnes were partners engaged for

some years in the practice of law under the partnership name of Gravel, Roy, and Burnes pursuant to an oral partnership agreement. The oral agreement provided that the assets and liabilities of the firm would be shared on the basis of 50% to Gravel, 25% to Roy, and 25% to Burnes. The first $120,000.00 of each year's earnings was distributed on the basis of 50% to Gravel, 25% to Roy, and 25% to Burnes. Annual earnings in excess of $120,000.00 were divided on the basis of 40% to Gravel, 30% to Roy, and 30% to Burnes.

In January 1980, Roy orally expressed his desire to withdraw from the partnership. The partners agreed that the partnership would terminate on 19 January 1980. In March 1980, the partners entered into a written dissolution agreement describing the manner in which certain former partnership

matters would be handled, particularly accounts receivable, pending cases, and the division of fees to be received. Each partner assumed certain responsibilities under the contract, agreed to continue handling cases and performing legal services, and to deposit funds received for services performed in the Fund Account as the property of all three partners. Funds in the Fund Account were to be distributed as they had been previously distributed under the oral agreement.

Roy was responsible for handling to completion the majority of the personal injury cases from the firm and, initially, Roy complied with the terms of the agreement. Later, however, Gravel and Burnes assert that Roy breached the agreement by failing to deposit settlement monies in the Fund Account. They also

contend that Roy retained funds that belonged to all the partners and used those funds for his personal benefit. Appellant, on the other hand, argued that in 1982, he received several complaints from Burnes that Gravel had not upheld his end of the agreement. As a result, Roy decided to withdraw from the agreement pursuant to paragraph "D" of the agreement and gave notice to the clients whose cases he was handling that they should select their own counsel, and purportedly, most of them chose Roy.

Roy filed an action in state court for a declaratory judgment seeking an interpretation of the agreement. Gravel and Burnes filed a reconventional demand requesting a money judgment against Roy for monies allegedly obtained from the settlement of cases, which were not paid to

them in accordance with the Agreement. After four years of trial preparation and discovery, the case was tried and judgment was rendered in November 1988 for Gravel and Burnes and against Roy on all material issues. The state trial court ruled that the agreement was a valid, binding, and fully enforceable contract and that Roy was individually liable to Gravel and Burnes. The judgment further reserved the rights of all parties to seek liquidation of the partnership and to require an accounting for certain partnership cases. Roy appealed the judgment to the Louisiana Third Circuit Court of Appeal. The tribunal affirmed the trial court's decision. Appellant later appealed the decision of the third Circuit to the Louisiana Supreme Court, but a writ of review was denied. When the appellant sought bankruptcy protection, the appellees

instituted adversary proceedings in the United States Bankruptcy Court for the Western District of Louisiana contending that the claims represented by the final state court judgment are non-dischargeable under the provisions of 11 U.S.C. Section 523(a)(4) and (6). Appelles reason that the debts are not dischargeable as they were created by the defalcation of Roy while acting in a fiduciary capacity, and was a willful and malicious injury caused by the bankrupt to appellees or the property of appellees. After reviewing the entire state court records, the evidence, and testimony of the parties, the bankruptcy court rendered judgment in favor of Gravel and Burnes and decreed that all sums due plaintiffs as set forth in the final judgment of the state court were

non-dischargeable under 11 U.S.C. Section 523(a)(4) and (6).

On appeal, Roy argues that (1) he was not a fiduciary within the meaning of Section 523 of the Bankruptcy Act and (2) that because he did not intent to violate a known duty, his actions fell short of what is traditionally considered a defalcation.

Our review of the bankruptcy court's decision is governed by the same standards employed by a review by the Fifth Circuit. A bankruptcy court's conclusions of law are subject to plenary review on appeal and the findings of fact are adopted, unless clearly erroneous. In re Niland, 825 F.2d 801, 806 (5th Cir. 1987) (quoting Wilson v. Huffman, 818 F.2d 1135, 1142 (5th Cir. 1987). "A finding of fact is clearly erroneous 'when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. "When a finding of fact is premised on an improper legal standard, or a proper one improperly applied, that finding loses the insulation of the clearly erroneous rule." Id.

Title 11 U.S.C. Section 523(a)(4) of the Bankruptcy Act provides that a discharge under section 727, 1141, or 1328(b) does not discharge an individual debtor from any debt created by fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The threshold questions on appeal is whether the appellant's relationship to the parties can be characterized as that of a fiduciary and whether his conduct can be construed as a defalcation as contemplated by the terms of the statute.

In Matter of Moreno, the Fifth Circuit defined "defalcation" as "a willful neglect of duty, even if not accompanies by fraud or embezzlement." 892 F.2d 417, 421 (5th cir. 1980). Appellant argues that the "willful neglect of duty" requirement of Moreno, contradicts the previous holding in Carey Lumber Co. v Bell, 615 F.2d 370 (5th Cir. 1990), and articulates a new standard requiring proof that the debtor knew of the duty. Conversely, in Bell, the Fifth Circuit charged the debtor with knowledge of the duty irrespective of scienter. See Carey Lumber Co. v Bell, 615 F.2d 370 (5th Cir. 1980). Based on this interpretation, Roy argues that because he believed his duty to his former partners terminated with the termination of the former partnership, he could not have committed a defalcation. As indicated by the findings of the bankruptcy

court in a well reasoned option, the standard for determining defalcation is an objective one that charges the debtor with knowledge of the law without weighing intent or motive. In re Johnson, 691 F.2d 249 (6th Cir. 1982) (relying on Carey Lumber Co. v Bell, 615 F.2d 370 (5th Cir. 1980)). The court in In re Johnson explained:

> Although the "badness" of fraud, embezzlement or misappropriation is readily apparent, creating a debt by breaching a fiduciary duty is a sufficiently bad act to invoke the Section 17(a)(4) [Section 523(a)(4) as amended] exception even without a subjective mental state evidencing intent to breach a known fiduciary duty or bad faith in doing so. This is because the requisite "badness," to conform with the spirit of the bankruptcy laws, is supplied by an individual's bankruptcy laws, is supplied by an individual's special legal status with respect to another, with its attendant duties and high standards of dealing, and the act of breaching these duties.

Id. at 256.

This court agrees with the bankruptcy court's legal definition of defalcation. The factual determination that Roy's violation of the written agreement of March 1990 was a defalcation is not clearly erroneous. After entering into a dissolution agreement, which the state courts found to be a valid, binding, and fully enforceable contract, and assuming certain responsibilities in accordance with the dissolution, Roy began violating the agreement in April 1982. He collected fees on cases and failed to deposit them in the Fund Account. Roy made no attempt to segregate the funds according to the agreement or to maintain them in a separate account until a court could determine if he had a legitimate reason for keeping the

funds, but continued to spend his money and that of his partners for his personal advantage. The explanations given by Roy have failed to justify adequately the diversion of the funds. There is little doubt that the misdirection of funds under his stewardship for his own use and his failure to account to Gravel and Burnes constituted a defalcation on the part of the plaintiff as contemplated by the bankruptcy statutes.

Next, appellant contends that he was not a fiduciary within the meaning of Section 523(a)(4) of the bankruptcy statute. Roy argues that the partnership in the case terminated on 19 January 1980 and that a s a result of the termination, the dissolution agreement was merely a contractual obligation to pay that supplanted the former

fiduciary relationship. Although the scope and meaning of a fiduciary relationship are questions of federal law, state law takes on importance in determining when a trust exists and when a fiduciary duties arise. Matter of Angelle, 610 F.2d 1335, 1341 (5th Cir. 1980). In explaining the appropriate role of state law in this inquiry, the Fifth Circuit stated:

> The state may impose trust-like obligations on those entering into certain kinds of contracts, and these obligations may make a contracting party a trustee. Of course, the trust must arise prior to and without reference to the act creating the debt. We also believe that state law may play importance in determining whether a specific case involves an express trust.
>
> Matter of Angelle, 610 F.2d at 1341.

Additionally, the law of partnerships in Louisiana provides:

> A partner owes a fiduciary duty to the partnership and to the partners. He may not conduct any activity, for himself or on behalf of a third person, that is contrary to his fiduciary duty and is prejudicial to the partnership. If he does so, he must account to the partnership and to his partners for the resulting profits.

La. Civ. code art. 2809. The Comments to Article 2809, although not part of the statute, cannot be ignored. The relationship imposes upon partners the "obligation of good faith and fairness in their dealing with one another with respect to the affairs of the partnership." This relationship as fiduciaries "continues until the partnership is liquidated." La. Civ. Code art. 2809, Comment (b); See Edco Properties v Landry, 371 So.2d 1367, 1373 (La. App. 3rd Cir. 1979).

It is clear that Gravel, Burnes, and Roy, were still bound together by their

fiduciary ties until the process of liquidation was finally complete. Moreover, the contract itself created an express trust sufficient to meet the requirements of a fiduciary relationship under 11 U.S.C. Section 532(a)(4). Both the dissolution agreement and state law imposed trust-like obligations on Roy and each of the other partners. The agreement provided that all monies received as fees on partnership cases by Roy and the others were to be deposited in the fund account established by the partners. The agreement also created a duty to segregate funds and a requirement of accounting. Appellant violated each of these contractually imposed duties and consequently breached his duty as fiduciary to both Gravel and Burnes. Here again, the bankruptcy judge was not clearly erroneous in his factual findings.

The final issue on appeal centers upon 11 U.S.C. Section 523(a)(6). This section of the bankruptcy code provides that the debt of an individual is not discharged if the debtor engaged in "willful and malicious injury . . . to another entity or to the property of another." In interpreting Section 523(a)(6), the Fifth Circuit has held "willful" to mean an intentional act and "malicious" to mean an act done without just cause or excuse. Chrysler Credit Corp. v Perry Chrysler Plymouth, Inc., 738 F.2d 480, 486 (5th Cir. 1986); Seven Elves, Inc. v Eskenazi, 704 F.2d 480, 486 (5th cir. 1983). The malicious element of Section 523(a)(6) does not require ill will or specific intent to do harm on the part of the appellant. Id. to fall within the purview of Section 523(a)(6), it is sufficient that Roy disregarded the

provisions of the dissolution agreement, purposefully failed to segregate the amounts that rightfully belonged to all the partners, and wrongfully used those amounts for his own benefit.

Based on the foregoing conclusions of law, the debt owed to appellees is non-dischargeable pursuant 11 U.S.C. Section 523(a)(4) and (6) because it is a debt caused by the defalcation of the bankrupt while acting in a fiduciary capacity. The decision of the bankruptcy court is AFFIRMED and the case REMANDED for further proceedings consistent with this opinion.

ALEXANDRIA, LOUISIANA, 30 April, 1992.

/s/ F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

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WESTERN STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CHRIS J. ROY

CIVIL ACTION NO. 91-1765

-vs-

SECTION "A" (JUDGE LITTLE)

CAMILLE F. GRAVEL, JR.
and RICHARD V. BURNES

J U D G M E N T

For the written reasons assigned this date, the decision of the bankruptcy court is AFFIRMED and the case REMANDED for

further proceedings consistent with this opinion.

ALEXANDRIA, LOUISIANA, 30 April, 1992.

/s/ F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE